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TRANSCRIPT OF RECORD

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S. C.

Supreme Court of the United States

OCTOBER TERM, 1936

No. 398

FOUNDERS GENERAL CORPORATION,
PETITIONER,

vs.

JAMES J. HOEY, COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1936.

CERTIORARI GRANTED NOVEMBER 9, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 398

FOUNDERS GENERAL CORPORATION,
PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Circuit Court of Appeals

for the Second Circuit

FOUNDERS GENERAL CORPORATION,
Plaintiff-Appellant,

against

JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant-Appellee.

Statement Under Rule XIII

This is an appeal from an order dated September 22, 1935, of Hon. Henry W. Goddard, Judge of the United States District Court for the Southern District of New York, which order and the judgment thereon were entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 25th and 28th days of September, 1935, respectively, which said order and judgment dismissed the complaint of the plaintiff-appellant herein.

Leave to appeal from said order and judgment of the District Court was granted by Hon. Henry W. Goddard by order dated October 23, 1935.

4 **Summons**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of
5 the State of New York,
Defendant.

L 59—p. 320

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of
6 the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 28th day of November A. D. 1934.

CHARLES WEISER,
Clerk.

(Seal)

SEIBERT & RIGGS,
Plaintiff's Attorney,
Office and Post Office Address,
2 Rector Street,
Borough of Manhattan,
City of New York.

Complaint

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,

against

JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

Founders General Corporation, the plaintiff herein, complaining of the defendant by Seibert & Riggs, its attorneys, respectfully shows and alleges as follows:

1. At all times hereinafter mentioned the plaintiff was and now is a corporation duly organized under the laws of the State of Maryland.

2. Defendant is the United States Collector of Internal Revenue for the Second District of the State of New York.

3. On September 10, 1929, plaintiff entered into a written agreement with United States Electric Power Corporation, a Maryland corporation, whereby plaintiff agreed on certain con-

10 ditions not here material to subscribe for one hundred thousand (100,000) shares of common stock of United States Electric Power Corporation, at a price of $13.50 per share, each share to be accompanied by a warrant entitling the holder to subscribe for one additional share of such common stock at the rate of $25.00 per share before January 2, 1940. The closing of the aforesaid transaction by delivery of the stock with warrants attached and the payment therefor was set at 12 o'clock noon September 11 17, 1929.

4. Subsequent to the aforesaid subscription, but prior to the time set for delivery above stated, plaintiff directed United States Electric Power Corporation to issue a certificate or certificates representing such one hundred thousand (100,000) shares, with warrants attached, of common stock of United States Electric Power Corporation in the name of Benton & Co., plaintiff's nominee.

12 5. Attached hereto, made a part hereof and marked "Exhibit A" is a photostat copy of an agreement made and entered into March 31, 1928, between Frank D. Erwin, Dean J. Almy, and Thomas H. Benton, under the terms of which said individuals formed a partnership the name of which was Benton & Co., the purpose of which was to enter into a contract with plaintiff, which was duly entered into by and between Benton & Co. and Plaintiff, a photostat copy of which contract is annexed hereto, made a part hereof and marked "Exhibit B."

6. On September 16, 1929 United States Electric Power Corporation pursuant to the direc-

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tion of the plaintiff hereinbefore in paragraph number 4 alleged, directed The Equitable Trust Company of New York, then transfer agent for its common stock, to make out one certificate in the name of the said Benton & Co. representing one hundred thousand (100,000) shares of its common stock, with a warrant attached, entitling the owner of such certificate to subscribe for an additional one hundred thousand (100,000) shares of such common stock, and cause the same to be countersigned by itself as transfer agent and registered by Chemical Bank & Trust Company, the registrar for said common stock, and when so made out, countersigned and registered, to be delivered to an officer of United States Electric Power Corporation duly authorized to receive the same.

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7. Thereafter said certificate, being a certificate of original issue, was duly registered on the books of the transfer agent of United States Electric Power Corporation in the name of Benton & Co., and delivered to an officer of United States Electric Power Corporation duly authorized to receive said certificate, pursuant to the aforesaid direction.

15

8. On September 17, 1929, pursuant to the agreement hereinabove in paragraph 3 hereof alleged, between United States Electric Power Corporation and plaintiff, United States Electric Power Corporation duly delivered said certificate for one hundred thousand (100,000) shares, with warrant attached as aforesaid, registered in the name of Benton & Co., to the plaintiff herein, and plaintiff paid United States Electric Power Corporation the amount subscribed, being the

16 consideration for such one hundred thousand (100,000) shares, together with the right to subscribe for an additional one hundred thousand (100,000) shares of said stock of United States Electric Power Corporation, all evidenced by said certificate with warrant attached.

9. The documentary stamp tax upon the original issue of said one hundred thousand (100,000) shares of common stock, with warrants attached, was duly paid by United States Electric Power
17 Corporation on the 17th day of September, 1929.

10. As to all or any part of the said one hundred thousand (100,000) shares of common stock, with warrants which have at any time been transferred out of the name of Benton & Co., the stock transfer tax imposed thereon by the Government of the United States has been duly paid.

11. In addition to the aforesaid documentary stamp tax on original issue, and the aforesaid
18 transfer tax in cases where the said stock and warrants have been transferred out of the name of Benton & Co., the defendant after notice and demand duly given to plaintiff, on the 22nd day of October, 1934, has illegally, erroneously and wrongfully collected from the plaintiff the sum of $4,733.33 as a tax with penalty and interest upon the alleged transfer by plaintiff to Benton & Co. of legal title to said stock or of the right to receive the same, and the said amount was on the 22nd day of October, 1934, paid to the defendant by plaintiff under protest.

12. Upon information and belief, the grounds upon which the assessment of the tax with pen-

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alty and interest of $4,733.33 aforesaid was made and the notice and demand for payment given are that by the designation of Benton & Co. as the nominee of plaintiff and by the issuance of the certificate (with warrant) in the name of Benton & Co. as aforesaid, a tax liability was incurred under the provisions of Schedule A-3, Title VIII of the Revenue Act of 1926. Plaintiff believes and therefore alleges that the assertion and assessment of the tax herein as aforesaid are contrary to the decision of the United States District Court for the Western District 20 of Pennsylvania in *Union Trust Company* v. *Heiner*, 26 Fed. (2d) 391, upon which plaintiff relied in failing to pay a tax upon the alleged transfer.

13. Thereafter, on the 26th day of October, 1934, plaintiff did make and file with the defendant a claim for refund of said tax, penalty and interest of $4,733.33, and thereby duly took an appeal to the Commissioner of Internal Revenue and demanded repayment of said amount in accordance with law and the regulations and 21 rules of the Treasury Department. A true copy of said claim for refund, omitting Exhibits "A" and "B" thereto which are attached as Exhibits "A" and "B" to this petition, is hereby annexed, made a part hereof, and marked "Exhibit C."

14. Thereafter, on the 20th day of November 1934, the Commissioner of Internal Revenue rejected said claim for refund of said tax, penalty and interest and disallowed said appeal.

22 *Complaint*

15. No part of the said sum of $4,733.33 illegally and without warrant or authority of law demanded and collected by the defendant from the plaintiff as aforesaid has been repaid to the plaintiff and the whole amount thereof with interest thereon from October 22, 1934 remains due and owing from the defendant to the plaintiff.

16. This is a suit of a civil nature at common law arising under the constitution and laws of the United States and under the laws of the
23 United States providing for internal revenue, and the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of $4,733.33, with interest thereon from October 22, 1934, together with the costs and disbursements of this action.

SEIBERT & RIGGS.

Dated, New York, November 26, 1934.

24

SEIBERT & RIGGS,
Attorneys for Plaintiff,
Office & Post Office Address,
2 Rector Street,
Borough of Manhattan,
City of New York.

R. E. T. RIGGS,
MURRAY TAYLOR,
HENRY J. RICHARDSON,
Of Counsel.

Exhibit A, Annexed to Complaint

25

EXHIBIT A

AGREEMENT made this 31st day of March, 1928, between

FRANK B. ERWIN
DEAN J. ALMY
THOMAS H. BENTON

WITNESSETH:

That the undersigned, being desirous of forming a general partnership for the purposes and upon the terms and conditions hereinafter stated, 26 have agreed and do hereby agree as follows:

(1) There is hereby formed a general partnership consisting of the undersigned as members of the firm and such other person or persons as from time to time by mutual consent of the undersigned may be admitted to membership therein.

(2) The name of the partnership is

BENTON & Co.

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(3) The purpose of the partnership is to enter into a contract with Founders General Corporation, a Maryland corporation, having an office at 50 Pine Street, Borough of Manhattan, City, County and State of New York, upon such terms as to consideration and otherwise as may be expressed in said contract, for the transaction of the business hereinafter mentioned.

(4) The business of the partnership shall be, and is hereby limited to, the holding in the firm name of stocks, bonds, notes and other securities

and property as agent (other than commission agent or broker) for the account of Founders General Corporation having an office at No. 50 Pine Street, Borough of Manhattan, City, County and State of New York; and otherwise acting with respect thereto in accordance, but only in accordance with written instructions of Founders General Corporation signed by one of its Vice-Presidents. The partnership shall not buy, sell, own, hold, borrow, pledge, or otherwise in any manner deal with or in any stocks, bonds, notes or other securities or property for the individual account of the firm or for the account of anyone other than Founders General Corporation, or buy, sell, borrow, pledge or otherwise in any manner deal with or in any stocks, bonds, notes, or other securities or property for the account of Founders General Corporation except pursuant to its written orders, signed as aforesaid, nor shall any member of the partnership do any of the foregoing acts for the individual account of the firm.

(5) The partnership is to continue until terminated by mutual agreement of the partners or until dissolved by the death or withdrawal of any partner.

(6) The partnership shall not have any capital.

(7) Neither the partnership nor any member thereof shall have or claim any beneficial interest whatsoever in any stocks, bonds, notes or other securities and property at any time held by the partnership, except any sums which may be

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paid or payable to the partnership as compensation pursuant to the terms of the above mentioned contract; and in the event of the death of any partner or partners during the continuance of the partnership, the estate of such deceased partner or partners shall have no interest in any of such items, except as aforesaid, nor in the partnership name, nor shall the legal representatives of such deceased partner or partners have any rights therein or thereto as a general partner or otherwise. All right, title, equity, interest, lien, claim and demand whatsoever in and 32 to any stocks, bonds, notes, and other securities and property at any time held or received or receivable by the partnership, except sums representing compensation paid or payable to the partnership pursuant to the terms of the above mentioned contract are hereby irrevocably waived and disclaimed.

(8) No partner shall at any time sign the partnership name for the purpose of creating any indebtedness except as herein otherwise provided.

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(9) For the purpose of transferring securities registered in the name of the partnership, the signatures of all the partners shall be necessary, except where the partnership signature is guaranteed by American Founders Trust or Founders General Corporation, in which case the firm name may be signed by any one partner or any attorney appointed by the partnership in a writing signed by all of the partners, or, in case of dissolution, by the surviving partners.

34 *Exhibit A, Annexed to Complaint*

(10) Any partner may withdraw from the partnership at any time by giving ten (10) days' notice in writing to the other partners of his intention so to do. In any such case the withdrawing partner shall have no further interest in the partnership assets or the partnership name. The termination of any partner's employment by Founders General Corporation howsoever caused, shall operate as a withdrawal from the partnership. Such withdrawal shall be effective on the
35 date of such termination of employment.

(11) Upon the termination of the partnership or the earlier dissolution thereof by the death or withdrawal of a partner, the surviving partner or partners, if they so elect, shall have the sole and exclusive right to retain and use the partnership name and good will and to do business as a new partnership thereunder and therewith; and, if they so elect but not otherwise, shall also succeed to all right, title and interest of the terminated or dissolved partnership in and to all
36 stocks, bond, notes and other securities and property held in its name.

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands and seals the day and year first above written.

FRANK B. ERWIN (L. S.
T. H. BENTON (L. S.
DEAN J. ALMY (L. S.

Exhibit B, Annexed to Complaint

State of New York, }
County of New York, } ss.:

On this 31st day of March, 1928, before me personally came FRANK B. ERWIN, DEAN J. ALMY and THOMAS H. BENTON, to me known to be the persons described in and who executed the foregoing instrument, and they duly severally acknowledged to me that they executed the same.

FRANK J. KILLIE
Commissioner of Deeds
City of New York
N. Y. Co. Clerk's No. 179
Term Expires May 17, 1929.

—

EXHIBIT B

AGREEMENT made and entered this 31st day of March, 1928, by and between FOUNDERS GENERAL CORPORATION, a Maryland corporation, having an office at No. 50 Pine Street, Borough of Manhattan, City, County and State of New York, (hereinafter called "the Corporation") of the first part.

And FRANK B. ERWIN, DEAN J. ALMY and THOMAS H. BENTON, individually and as members of the firm of BENTON & Co., a partnership having an office at No. 50 Pine Street, Borough of Manhattan, City, County and State of New York (hereinafter called "the Partnership"), of the second part.

Exhibit B, Annexed to Complaint

40 WHEREAS, Founders General Corporation desires to appoint and employ an agent for the limited purpose and with the limited authority hereinafter expressed and the partnership is willing to accept such appointment and employment upon the terms and conditions hereinafter stated.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

41 That in consideration of the premises and of the mutual promises herein contained, the parties hereto have agreed and do hereby agree respectively as follows:

(1) The Corporation hereby appoints and employs the Partnership as its agent, to serve as such until the appointment and authority hereby conferred shall be revoked, for the limited purpose of holding in the firm name stocks, bonds, notes, and other securities and property as agent (other than commission agent or broker) for the account of the Corporation and of otherwise act-
42 ing with respect thereto in accordance, but only in accordance with the written instructions of the Corporation signed by one of its Vice-Presidents with power and authority limited to holding such items in the firm name and otherwise acting with respect thereto as herein provided.

(2) The Corporation shall pay the Partnership for its services as agent as aforesaid at the rate of $1500.00 per annum.

(3) The Partnership hereby accepts such appointment and employment upon the terms and conditions herein stated and at all times will

faithfully and promptly carry out, perform and observe the instructions of the Corporation in regard to the holding or otherwise acting with respect to stocks, bonds, notes and other securities and property. 43

(4) The Partnership will not buy, sell, own, hold, borrow, pledge, or otherwise in any manner deal with or in any stocks, bonds, notes, or other securities or property, for the individual account of said firm, or for the account of any one other than the Corporation, or buy, sell, borrow, pledge, or otherwise in any manner deal with or in any stocks, bonds, notes or other securities or property for the account of the Corporation except as herein provided, nor will any member of the Partnership do any of the foregoing acts for the individual account of said firm. 44

(5) Neither the Partnership nor any member thereof shall have or claim any beneficial interest whatsoever in any stocks, bonds, notes or other securities and property, at any time held by the Partnership except any sums which may be paid or payable to the Partnership as compensation pursuant to the terms of this agreement; and in the event of the death of any partner or partners during the continuance of the partnership, the estate of such deceased partner or partners shall have no interest in any of such items, except as aforesaid, nor in the partnership name, nor shall the legal representatives of such deceased partner or partners have any rights therein or thereto as a general partner or otherwise. All right, title, equity, interest, lien, claim and demand whatsoever in and to any stocks, bonds, notes and other securities and 45

46 property at any time held or received or receivable by the partnership, except sums representing compensation paid or payable to said firm by the Corporation pursuant to the terms of this agreement, are hereby irrevocably waived and disclaimed by said firm and each and every member thereof.

Promptly upon request of the Corporation, the Partnership and the several members thereof will, from time to time, execute and deliver all such assignments, powers of attorneys, dividend
47 orders, proxies, waivers, declarations of trust, disclaimers and other instruments, general or specific, as may be presented by the Corporation for that purpose with respect to any stocks, bonds, notes and other securities and property that may now or hereafter be registered in the name of the Partnership or be received or receivable by the Partnership, and will endorse and deliver to the Corporation all cheques, drafts and orders for the payment of money that may be received by the Partnership or any member thereof, relating to any such item. The Corpo-
48 ration is hereby constituted and appointed the true and lawful agent and attorney of the Partnership, with full power and authority irrevocable to sell, assign, endorse, transfer and deliver all stocks, bonds, cheques, notes and other securities and property now or hereafter at any time standing in the name of the Partnership or in its possession, and to execute and deliver all such instruments as may be necessary or proper for that purpose, with full power of substitution.

(4) For the purpose of transferring securities registered in the name of the Partnership, the

signatures of all of the partners shall be necessary except where the partnership signature is guaranteed by the American Founders Trust or Founders General Corporation, in which case the firm name may be signed by any one partner or any attorney appointed by the partnership in a writing signed by all of the partners, or in the case of dissolution, by the surviving partners.

(5) The Corporation will at all times protect and indemnify the partnership and each of the several members thereof against, and save them and each of them harmless of and from, any and all costs, expenses, damages, claims, demands and liabilities of whatsoever kind or character that may arise out of this agreement or the performance thereof, or may be incurred with respect to any stocks, bonds, notes and other securities and property at any time dealt with hereunder or with respect to any transactions concerning any such items which may be ordered or directed by the Corporation, save and except only such costs, expenses, damages, claims, demands, and liabilities, if any, as may arise or be imposed upon any member of the partnership by reason of the wrongful acts, misconduct or neglect of such member.

(6) This agreement shall inure to the benefit of and shall bind the parties hereto and their respective successors, legal representatives and assigns.

IN WITNESS WHEREOF the Corporation has caused this agreement to be executed by one of its Vice-Presidents and its corporate seal to be

hereunto affixed and attested by an assistant secretary, and the several individual parties of the second part hereto have hereunto set their respective hands and seals, all as of the day and year first above written.

FOUNDERS GENERAL CORPORATION,

By DEAN J. ALMY
Vice-President

FRANK B. ERWIN
T. H. BENTON DEAN J. ALMY
Individually and as Members of the Firm of BENTON & Co.

Attest:

E. MACBRIDE
Assistant Secretary

State of New York, }
County of New York, } ss.:

On this 31st day of March, 1928, before me came Dean J. Almy to me known, who being by me duly sworn, did depose and say that he resides in Orange, N. J., that he is a vice-president of FOUNDERS GENERAL CORPORATION, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation, and that he signed his name thereto by like order.

FRANK J. KILLIE,
Commissioner of Deeds
City of New York
Term Expires May 17, 1929

Exhibit B, Annexed to Complaint

State of New York, }
County of New York, } ss.:

On this 31st day of March, 1928, before me came FRANK B. ERWIN, DEAN J. ALMY and THOMAS H. BENTON, to me known to me to be the persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

FRANK J. KILLIE
Commissioner of Deeds,
City of New York.

State of New York, }
County of New York, } ss.:

On this 31st day of March, 1928, personally appeared before me FRANK B. ERWIN, DEAN J. ALMY and THOMAS J. BENTON, personally known to me to be the members of the firm of BENTON & Co., to me known to be the persons described in and who executed the foregoing instrument in the firm name of BENTON & Co., and they duly acknowledged that they executed the same as their act and deed of said firm of BENTON & Co., for the uses and purposes therein mentioned.

FRANK J. KILLIE
Commissioner of Deeds
City of New York

58 *Exhibit C, Annexed to Complaint*

EXHIBIT C

C L A I M

To Be Filed with the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

59 [x] Refund of Tax Illegally Collected.
[ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
[ ] Abatement of Tax Assessed (not applicable to estate or income taxes).

State of New York, }
County of New York, } ss.:

Name of taxpayer or purchaser of stamps—Founders General Corporation
Business address—#1 Exchange Place, Jersey
60 City, New Jersey
Residence——

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed —Second District of New York

2. Period (if for income tax, make separate form for each taxable year) from ——, 19——, to ——, 19——

3. Character of assessment or tax—Stock Transfer Stamp Tax

4. Amount of assessment, $4,733 33/100; dates of payment October 22nd, 1934.

Exhibit C, Annexed to Complaint 61

5. Date stamps were purchased from the Government——

6. Amount to be refunded—$4,733 33/100

7. Amount to be abated (not applicable to income or estate taxes)—— $——

8. The time within which this claim may be legally filed expires, under Section —— of the Revenue Act of 19—— on ——, 19——

The deponent verily believes that this claim should be allowed for the following reasons: 62

Claimant, Founders General Corporation, is a corporation organized under the laws of the State of Maryland, with its principal address and place of business at 1 Exchange Place, Jersey City, New Jersey.

On September 10th, 1929 claimant entered into a written agreement with United States Electric Power Corporation, a Maryland corporation, whereby claimant agreed, on certain conditions not here material, to subscribe for one hundred thousand (100,000) shares of Common Stock of United States Electric Power Corporation 63 at a price of $13.50 per share, each share to be accompanied by a warrant entitling the holder to subscribe for one additional share of such Common Stock at the rate of $25 per share before Janaury 2, 1940. The closing of the aforesaid transaction by delivery of the stock, with warrants attached, and the payment therefor was set at 12 o'clock noon September 17th, 1929.

Subsequent to the aforesaid subscription, but prior to the time set for delivery above stated, the claimant directed United States Electric Power Corporation to issue a certificate or certificates representing such one hundred thousand

64 (100,000) shares, with warrants attached, of Common Stock of United States Electric Power Corporation in the name of Benton & Co., claimant's nominee.

Attached hereto, made a part hereof, and marked "Exhibit A" is a photostat copy of an agreement made and entered into March 31st, 1928 between Frank B. Erwin, Dean J. Almy and Thomas H. Benton, under the terms of which said individuals formed a partnership, the name of which was Benton & Co., the purpose
65 of which was to enter into a contract with claimant, which was duly entered into by and between Benton & Co. and claimant, a photostat copy of which contract is annexed hereto, made a part hereof, and marked "Exhibit B."

On September 16th, 1929 United States Electric Power Corporation pursuant to the direction of the claimant hereinbefore alleged, directed The Equitable Trust Company of New York, then the transfer agent for its Common Stock, to make out one certificate in the name of said
66 Benton & Co. representing one hundred thousand (100,000) shares of its Common Stock, with a warrant attached entitling the owner of such certificate to subscribe for an additional one hundred thousand (100,000) shares of said Common Stock, and cause the same to be countersigned by itself as transfer agent, and registered by Chemical Bank & Trust Company, the registrar for said Common Stock, and when so made out, countersigned and registered, to be delivered to an officer of United States Electric Power Corporation duly authorized to receive the same.

Thereafter said certificate, being a certificate of original issue, was duly registered on the

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books of the transfer agent of United States Electric Power Corporation in the name of Benton & Co., and delivered to an officer of United States Electric Power Corporation duly authorized to receive said certificate pursuant to the aforesaid direction.

On September 17th, 1929, pursuant to the agreement hereinabove alleged between United States Electric Power Corporation and claimant, United States Electric Power Corporation duly delivered said certificate for one hundred thousand (100,000) shares, with warrant attached as 68
aforesaid, registered in the name of Benton & Co., to the claimant herein, and claimant paid to United States Electric Power Corporation the amount subscribed, being the consideration for such one hundred thousand (100,000) shares, together with the right to subscribe for an additional one hundred thousand (100,000) shares of said stock of United States Electric Power Corporation, all evidenced by said certificate with warrant attached.

The documentary stamp tax upon the original issue of said one hundred thousand (100,000) 69
shares of Common Stock was duly paid by United States Electric Power Corporation on the 17th day of September, 1929.

As to all or any part of the said one hundred thousand (100,000) shares of Common Stock, with warrants, which have at any time been transferred out of the name of Benton & Co., the stock transfer tax imposed thereon by the Government of the United States has been duly paid.

In addition to the aforesaid documentary stamp tax on original issue, and the aforesaid docu-

70 mentary stamp tax on original issue, and the aforesaid transfer tax in cases where the said stock and warrants have been transferred out of the name of Benton & Co., the Collector of the United States Internal Revenue for the Second District of the State of New York, after notice and demand duly given to claimant on October 22nd, 1934, has illegally collected from the claimant the sum of Four Thousand Seven Hundred Thirty-three and 33/100 ($4,733.33/100) Dollars as a tax upon the alleged transfer by claimant
71 to Benton & Co. of legal title to said stock, or of the right to receive the same, and the said amount was, on the 22nd day of October, 1934, paid to said Collector by claimant under protest.

Upon information and belief, the grounds upon which the assessment of the said tax was made, and the notice and demand for payment given, are that by the designation of Benton & Co. as the nominee of claimant, and by the issuance of the certificate (with warrant) in the name of Benton & Co. as aforesaid, a tax liability was incurred under the provisions of Sched-
72 ule A-3, Title VIII, of the Revenue Act of 1926. Claimant alleges that the assertion and assessment of said tax herein, as aforesaid, are contrary to the decision of the United States District Court for the Western District of Pennsylvania in *Union Trust Company* against *Heiner,* 26 Fed. (2nd) 391, upon which claimant relied in failing to pay a tax upon the alleged transfer at the time the stock was issued as aforesaid.

Signed—FOUNDERS GENERAL CORP.
E S GLINES

Sworn to and subscribed before me this
26th day of October, 1934.

JOHN P. DICKE
(Notarial Seal)

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Notice of Motion for Judgment Dismissing the Complaint Pursuant to Rule 106 of the Rules of Civil Practice of the Supreme Court of the State of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against

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JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

(L 59—320)

SIRS:

PLEASE TAKE NOTICE that on the complaint in this action the defendant will move this Court at a term thereof for motions, to be held on the 9th day of July, 1935, at Room 235, of the Old Post Office Building, in the Borough of Manhattan, City of New York, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the plaintiff's complaint and for judgment thereon, pursuant to Section 280 of the New York State Civil Practice Act, and Rule 106 of the Rules of Civil Practice of the Supreme Court of the State of New York, on the grounds that the plaintiff's complaint does not state facts

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sufficient to constitute a cause of action and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N .Y., July 2, 1935.

Yours, etc.,

F. W. H. ADAMS,
United States Attorney for the
Southern District of New York,
77 Attorney for the Defendant,
Office and Post Office Address,
U. S. Courts and P. O. Building,
Borough of Manhattan,
City of New York.

To:

SEIBERT & RIGGS, Esqs.,
Attorneys for the Plaintiff,
2 Rector Street,
New York City.

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Opinion of Goddard, *U. S. D. J.* 79

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.
L59—320

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GODDARD, District Judge:

This motion, equivalent to a demurrer, raises the question whether the facts alleged in the complaint disclose a transaction subject to the documentary stamp tax which was assessed and collected from the plaintiff under Schedule A(3) of Section 800 of the Revenue Act of 1926. The facts alleged may be summarized as follows: 81

On September 10, 1929 plaintiff made a written agreement with an electric power corporation, hereinafter referred to as the issuing corporation, to subscribe at the price of $13.50 per share for 100,000 shares of the issuing corporation's common stock, each share to be accompanied by a warrant entitling the holder to subscribe for one additional share of such common stock before January 2, 1940 at the fixed price of $25 per share. The shares, with accompanying

82 warrants, were to be delivered and payment therefor was to be made on September 17, 1929. Before the time set for delivery, the plaintiff directed the issuing corporation to have the certificate representing the said 100,000 shares of stock with accompanying warrants, made out in the name of the plaintiff's nominee, Benton & Company. This was done, and on September 17, 1929 such certificate was delivered to the plaintiff upon payment by it of the agreed subscription price. The documentary stamp tax upon
83 the original issue of said 100,000 shares of stock and accompanying warrants, was duly paid by the issuing corporation, and stock transfer taxes have been duly paid as to all shares and warrants which have been transferred out of the name of Benton & Company. In addition, the taxing authorities demanded from the plaintiff, and on October 22, 1934, collected the sum of $4,733.33 as a tax, with penalty and interest, upon the alleged transfer by the plaintiff to its nominee, Benton & Company, because of the plaintiff's
84 direction for issuance of the aforesaid certificate in the latter's name.

Benton & Company is a partnership, whose sole business is to hold in the firm's name stocks, bonds and other securities belonging to the plaintiff, and to transfer them at the plaintiff's request. Neither the firm nor any partner has any beneficial interest in the property so held. The firm receives from the plaintiff an annual fee of $1500 for acting as such agent.

Contending that the tax so collected from it was illegal, the plaintiff filed a claim for a refund and upon its rejection brought this suit.

85

The defendant's motion to dismiss squarely raises the question whether the nomination by the plaintiff or Benton & Company as the person in whose name the certificate should be made out is subject to tax under the statute in question.

Section 800 of the Revenue Act of 1926 provides that

> "On and after the expiration of thirty days after the enactment of this act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures 86
> or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this title * * * the several taxes specified in such schedule."

Schedule A(3) reads as follows:

> "3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock * * * or to rights to 87
> subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share; * * *."

88 Regulation 71 relating to stamp taxes on documents imposed by the Revenue Act of 1926, and the Revenue Act of 1928 contain the following provisions:

> "Art. 31. Basis of Tax. Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale * * * or delivery of or transfer of the legal title to shares, or certificates of stock
> 89 * * * or of the right to subscribe for or to receive such shares or certificates, regardless of the time or manner of the delivery of the certificates, or agreement or memorandum of sale."

> "Art. 34. Sales and Transfers Subject to Tax. The following transactions are subject to the tax:

> (a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits or of interest in property or
> 90 accumulations in corporations, joint-stock companies, or associations.

> (b) The sale or transfer of shares of stock, whether or [illegible] represented by certificates.

> (c) The transfer of stock to or by trustees.

> * * * * * *

> (g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants. 91

* * * * * *

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock." 92

"Art. 77. FURTHER DEFINITIONS. (I) When used in these regulations:

(b) The term 'issue' includes not only actual delivery of, but also acceptance of subscriptions to shares or certificates of stock * * *."

"Art. 85. AFFIXING AND CANCELLATION OF STAMPS. (a) In the case of the issue of shares of stock, whether on organization or reorganization, the stamps representing the tax shall be affixed to the stock books and not to the certificates issued." 93

From the foregoing excerpts it is apparent that the statutory basis of taxation is very broad and that the regulations have been drafted in equally inclusive terms. With certain express exceptions, not now material, a tax is laid upon every transfer of the legal title to shares or certificates of stock, or to rights to subscribe for or receive such shares or certificates, whether or not the transferee acquires any beneficial interest.

94 If the issuing corporation had issued the shares subscribed for to the plaintiff and the latter had then transferred them to its agent, Benton & Company, it cannot be doubted that the government would have been entitled to collect two stamp taxes: one on the sale of the stock to the plaintiff; the other on the transfer of legal title from the plaintiff to its agent. But the transaction as actually carried out did not take this form, although it accomplished the same result, and in the matter of stamp duties the form
95 is all important. *United States* v. *Isham,* 17 Wall. 496. The tax cannot therefore be sustained on the theory that in legal effect the transaction was the same as though the plaintiff had taken legal title to the shares and transferred them to its nominee. But it can be sustained, in my opinion, on the theory that the nomination of Benton & Company as the person to whom the certificate was to be issued, falls within the exact letter of the statute taxing "transfers of legal title to * * * rights * * *
96 to receive such shares or certificates". Prior to such nomination the plaintiff had the right to receive the shares and by its nomination its right was transferred to its nominee. True, the right was conditional upon payment for the shares by the plaintiff, but the statute does not indicate that the right to receive shares must be unconditional at the time when it is transferred in order to constitute a taxable transfer. The phrase of the statute upon which I rely has been applied in several cases where one corporation has sold its assets to another to be paid for by stock of the latter which the vendor directed

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to be issued to its stockholders. *Marconi Wireless Telegraph Co.* v. *Duffy*, 273 Fed. 197; *George A. Hormel & Co.* v. *United States*, 10 Fed. Supp. 623; *United States* v. *Brown Fence & Wire Co.*, 9 Fed. Supp. 1008; *Raybestos Manhattan Inc.* v. *United States*, 10 Fed. Supp. 130. Compare cases reaching a different result on slightly different facts. *Minnesota M. & M. Co.* v. *Willcuts*, 2 Fed. Supp. 789; *Westmoreland Coal Co.* v. *McLaughlin*, 8 Fed. Supp. 963. *Shreveport-El Dorado Pipe Line Co.* v. *McGrawl*, 63 Fed. (2nd) 202 (C. C. A. 5).

98

The *Marconi* case, in my judgment, is right and should govern the case at bar. It is true that in the *Marconi* case the nominees received the stock for their own benefit, while here Benton & Company holds it for the plaintiff. But the fact that the transferee gets no beneficial interest is made immaterial by the express terms of the statute.

The plaintiff makes no attempt to explain why the nomination of Benton & Company should not be deemed a transfer of plaintiff's right to receive shares of stock. It rests its argument chiefly upon *Union Trust Co.* v. *Heiner*—26 Fed. (2nd) 391, and cases following it. *Dean* v. *Caldwell & Co.*—9 Fed. Supp. 177; *Field, Glore & Company* v. *United States* (Northern District, Illinois, April 8, 1935).

99

It seems to me that the decision in *Union Trust Co.* v. *Heiner* disregards the express words of the statute. There the argument that the nominee transferred a "right to receive" the shares seems to have been disposed of by the court with the statement that the nominee was a mere employee and had no beneficial interest in the stock.

100 *Order Appealed From*

But since the statute itself says that it is immaterial whether the transferee receives a beneficial interest, I am not inclined to follow *Union Trust Co.* v. *Heiner.*

In my opinion the tax was validly assessed, and accordingly the motion to dismiss the complaint is granted.

September 10th, 1935.

HENRY W. GODDARD,
U. S. D. J.

101

Order Appealed From

At a Stated Term of the United States District Court held in and for the Southern District of New York in the U. S. Courts and Post Office Building, Borough of Manhattan, City of New York, on the 22nd day of September, 1935.

102 Present—Hon. HENRY W. GODDARD,
United States District Judge.

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.
} L59—320

The defendant having moved this Court for an

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order dismissing the complaint herein, and the said motion having duly come on to be heard on the 9th day of July, 1935,

Now, on the reading and filing of the notice of motion herein, dated June 6, 1935, and after hearing F. W. H. Adams, Esq., United States Attorney for the Southern District of New York, attorney for the defendant, James J. Hoey, Collector of United States Internal Revenue for the Second District of the State of New York, Henderson Mathews, Assistant United States Attorney, of counsel, in support of the motion, and Royal E. T. Riggs, Esq., attorney for the plaintiff, in opposition thereto, and due deliberation having been had thereon, it is

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ORDERED that the motion be and the same is hereby granted and the complaint herein is dismissed, and it is

FURTHER ORDERED that the defendant have judgment for costs against the plaintiff, Founders General Corporation, and that execution issue therefor.

105

HENRY W. GODDARD,
U. S. D. J.

106 **Judgment Appealed From**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
107 *Defendant.*
} L59—320

A motion of the defendant to dismiss the complaint in the above entitled action having come on regularly to be heard on the 9th day of July, 1935, before the Honorable Henry W. Goddard, and the defendant having appeared by F. W. H. Adams, Esq., United States Attorney for the Southern District of New York, by Henderson Mathews, Assistant United States Attor-
108 ney, of counsel, in support of the motion, and the plaintiff having appeared by Royal E. T. Riggs, Esq., in opposition thereto, and the Court after deliberation having granted the motion of the defendant to dismiss the complaint herein, and having directed that judgment herein be entered in favor of the defendant, James J. Hoey, Collector of United States Internal Revenue for the Second District of the State of New York, against the plaintiff, Founders General Corporation, for costs, and the defendant's costs having been taxed in the sum of $20.00 and upon the filing of the order herein,

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Now, on motion of F. W. H. Adams, United States Attorney for the Southern District of New York, attorney for the defendant, it is

ORDERED and ADJUDGED that the complaint herein be and it is hereby dismissed and that the defendant, James J. Hoey, Collector of United States Internal Revenue for the Second District of the State of New York, recover of the plaintiff, Founders General Corporation, the sum of $20.00, costs as taxed, and that execution issue therefor.

110

Judgment entered this 28th day of September, 1935.

CHARLES WEISER,
Clerk.

Petition for Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

111

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

The plaintiff, Founders General Corporation, considering itself aggrieved by the decision, order and judgment of the District Court of the Southern District of New York, which order and judgment were entered herein in the office of the

112 *Petition for Appeal*

Clerk of this Court on the 25th and 28th days of September, 1935 respectively, in favor of the defendant above named and against the plaintiff above named, ordering and adjudging that the complaint of the plaintiff herein be dismissed, and that the defendant recover of the said plaintiff the sum of $20. costs as taxed, does hereby petition for appeal from said decision, order and judgment for the reasons specified in the Assignment of Errors filed simultaneously herewith, and prays that the appeal may be allowed to the
113 United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, October 23, 1935.

FOUNDERS GENERAL CORPORATION,
By SEIBERT & RIGGS

Signed SEIBERT & RIGGS,
Its Attorneys,
No. 30 Broad Street,
Borough of Manhattan,
City of New York.
114

MURRAY TAYLOR
of Counsel.

Allowance of Appeal

115

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

116

Upon the foregoing petition, it is

ORDERED, that the appeal herein prayed for by the plaintiff above named, be and the same hereby is allowed.

Dated, New York, October 23, 1935.

117

HENRY W. GODDARD
C. W. U. S. D. J.

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Assignment of Errors

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

119

Now comes the plaintiff in the above entitled cause and makes and files the following assignment of errors, upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the order and judgment entered by this Honorable Court on the 25th and 28th days of September, 1935, respectively, in favor of the

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above named defendant and against the above named plaintiff ordering and adjudging that the complaint of the plaintiff herein be dismissed and that the defendant recover of the said plaintiff the sum of $20. costs, as taxed; and shows that in the proceedings, record, order and judgment in the above entitled cause there was error in the following respects:

1. There was error by the United States District Court for the Southern District of New York in granting the motion made by the de-

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fendant to dismiss the complaint, and in ordering and adjudging that the complaint be dismissed, and that the defendant recover $20. costs as taxed.

Dated, New York, October 23, 1935.

FOUNDERS GENERAL CORPORATION,
By SEIBERT & RIGGS

Signed SEIBERT & RIGGS,
Its Attorneys,
No. 30 Broad Street,
Borough of Manhattan,
City of New York.

122

MURRAY TAYLOR
of Counsel.

123

124

Citation

By the Honorable Henry W. Goddard
One of the United States District Judges for the Southern District of New York, in the Second Circuit

To

James J. Hoey,
Collector of United States Internal Revenue for the Second District of the State of New York,

125 Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named on the 21st day of November, 1935, pursuant to an appeal to said court filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Founders General Corporation is the appellant and you are the appellee to show cause, if any there
126 be, why the order and judgment in said petition for appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 23rd day of October, in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the one hundred and sixtieth.

Henry W. Goddard
United States Judge for the Southern District of New York in the Second Circuit.

C.W.

Stipulation as to Record 127

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION, *Plaintiff-Appellant,* *against* JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York, *Defendant-Appellee.*	L59—320

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IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, N. Y., December 12, 1935.

SEIBERT & RIGGS,
Attorneys for Plaintiff-Appellant. 129

LAMAR HARDY,
United States Attorney for the Southern District of New York,
Attorney for Defendant-Appellee.

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Clerk's Certificate

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,

against

JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

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I, CHARLES WEISER, Clerk of the District Court of the United States for the Southern District of New York, DO HEREBY CERTIFY that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by stipulation between the attorneys for the respective parties.

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IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed at The City of New York, in the Southern District of New York, this day of December, in the year of our Lord one thousand nine hundred and thirty-five, and of the independence of the United States the one hundred and sixtieth.

CHARLES WEISER,
Clerk.

(Seal)

[fol. 45] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued March 6, 1936. Decided July 6, 1936

No. 282

FOUNDERS GENERAL CORPORATION, Plaintiff-Appellant,

v.

JAMES J. HOEY, Collector, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Appeal from United States District Court for the Southern District of New York.

From a judgment dismissing the complaint in this action on the ground that it stated no cause of action, the plaintiff appeals. Affirmed.

Seibert & Riggs, of New York City (Royal E. T. Riggs and Murray Taylor, both of New York City, of counsel), for plaintiff-appellant.

Lamar Hardy, U. S. Atty., of New York City (Henderson Mathews, Asst. U. S. Atty., and Richard Delafield, Sp. Asst. to the U. S. Atty., both of New York City, of counsel), for defendant-appellee.

AUGUSTUS N. HAND, Circuit Judge:

This action was brought to recover from the defendant, as collector of internal revenue, the sum of $4,733.33, and interest, which was a tax alleged to have been collected by him from the plaintiff without lawful authority. On September 10, 1929, the plaintiff, Founders General Corporation, entered into a written agreement with United States Electric Power Corporation to subscribe for 100,000 shares of the common stock of the latter at a price of $13.50 per share, each share to be accompanied by a warrant entitling the holder to subscribe before January 2, 1940, for an addi-

tional share at the rate of $25 per share. The 100,000 shares with warrants attached were to be delivered on September 17, 1929. After its subscription, but prior to September 17, 1929, the plaintiff directed the seller to issue the securities in the name of Benton & Co. as its nominee. In accordance with these instructions, the United States Electric Power Corporation caused a certificate for 100,000 shares with warrants attached to be issued in the name of Benton & Co. The power corporation paid the documentary stamp tax upon this issue, and, upon receipt of the amount subscribed for the stock, delivered the securities issued in the name of Benton & Co. to the plaintiff. It is to be observed that unde rthis arrangement there was never any delivery of the certificate to Benton & Co.; but it passed directly from the power corporation to the plaintiff. Benton & Co. is a partnership whose sole business is to have securities belonging to the plaintiff taken and held in its name. Neither that firm nor any of its members have any interest in securities so held. Under a contract with the plaintiff, it receives an annual fee of $1,500 for acting as the latter's nominee.

Some of the shares issued by the power company were thereafter transferred to third parties from the name of Benton & Co., and upon these a stock transfer tax was paid. But, in spite of the payment of the documentary tax on the [fol. 46] issue and the transfer tax on those shares transferred from the name of Benton & Co., the Commissioner assessed a stock transfer tax amounting with penalty and interest, to $4,733.33, upon the alleged transfer of the 100,000 shares of stock from the plaintiff to Benton & Co. This sum the plaintiff paid to the collector and now seeks to recover in the present action on the ground that the transaction involved no transfer, and the tax was therefore an unlawful exaction.

In a contract between the Founders General Corporation and the partnership of Benton & Co., it was provided that the latter was appointed agent "for the limited purpose of holding in the firm name stocks, bonds, notes, and other securities and property as agent (other than commission agent or broker) for the account of the Corporation and of otherwise acting with respect thereto in accordance, but only in accordance with the written instructions of the Corporation. * * *" It was also provided that Ben-

ton & Co. should have no "beneficial interest" in securities so held, that it waived all right, title, and interest in any securities held or received by it, and that the corporation was appointed the agent and attorney of Benton & Co., with full power to sell, assign, indorse, transfer, and deliver such securities.

The court dismissed the complaint, which set forth the foregoing facts on the ground that it stated no cause of action, and from the judgment of dismissal the present appeal was taken. The question is whether the mere nomination of Benton & Co. as a dummy in whose name the stock was registered subjected the plaintiff to a stock transfer tax under title 8, section 800, of the Revenue Act of 1926 (44 Stat. 99, 101).

This section, so far as applicable, reads as follows:

"Schedule A.—Stamp Taxes. * * *

"3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper, or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: Provided, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: Provided further, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts."

It is to be observed that the act imposes a tax not only on "transfers of legal title to shares or certificates of stock," but also on transfers of legal title "to rights to subscribe for or to receive such shares or certificates." Judge Goddard, who presided in the District Court, 12 F. Supp. 290, 292, upheld the tax in an opinion that shows how inevitable was the result reached. He said that: "The nomination of Benton & Co. as the person to whom the certificate was to be issued falls within the exact letter of the statute taxing 'transfers of legal title to * * * rights * * * to receive such shares or certificates.' Prior to such nomination the plaintiff had the right to receive the shares, and by its nomination its right was transferred to its nominee. True, the right was conditional upon payment for the shares by the plaintiff, but the statute does not indicate that the right to receive shares must be unconditional at the time when it is transferred in order to constitute a taxable transfer."

In Union Trust Co. v. Heiner, 26 F. (2d) 391, the District Court for the Western District of Pennsylvania held that transfers to mere nominees were not subject to tax. In that case stock was purchased by the plaintiff, and, by his order, was taken in the name of his employee, [fol. 47] who had no beneficial interest therein and took the certificate merely for the convenience of the plaintiff in connection with future sales and transfers. The statute involved was section 1100, Schedule A (3) of title 11 of the Revenue Act of 1921 (42 Stat. 303, 304), which, like the act of 1926, imposed a stamp tax upon the transfer of "rights to subscribe for or to receive" certificates of capital stock. The decision went off on the theory that there "was no transfer of any rights in this stock to Kommer," the employee, because "he was the mere employee and agent of the plaintiff, appointed to receive and hold this capital stock for the sole and exclusive benefit of the plaintiff. He had no beneficial interest whatever in the stock." Under the act of 1921, as under the later acts, the tax was imposed upon transfers "whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not." It is plain that the court in Union Trust Co. v. Heiner ignored the express provision that the absence of any beneficial interest on the part of the holder should not exempt the transfer from taxation. The decision, there-

fore, proceeded on an indefensible theory. That decision has since been followed by various district courts, but we cannot avoid the conclusion that it is contrary to the plain meaning of the statute. Indeed, the provisos in the act of 1926 to the effect that no tax shall be imposed upon an agreement for deposit of certificates for collateral security seem to set the entire limit of all exceptions to the broadly inclusive terms of the act. They can hardly have been inserted merely ex abundanti cautela. The sweeping character of the statute is further indicated by the decisions of the Supreme Court in Raybestos-Manhattan Co. v. United States, 296 U. S. 60, 56 S. Ct. 63, 80 L. Ed. —, 102 A. L. R. 111, and Provost v. United States, 269 U. S. 443, 46 S. Ct. 152, 70 L. Ed. 352. A broad construction of a statute of the state of New York, which was substantially like section 800 of the Revenue Act of 1926, was adopted by the New York courts in Bonbright & Co. v. New York, 165 App. Div. 640, 151 N. Y. S. 35, and Travis v. Ann Arbor, 180 App. Div. 799, 168 N. Y. S. 53, affirmed 227 N. Y. 640, 126 N. E. 923. Under that statute (Tax Law [Consol. Laws N. Y.] § 270, as amended by laws 1911, c. 352) a stamp tax was imposed upon transfers "whether investing the holder with the beneficial interest in or legal title to * * * stock or merely with the possession or use thereof for any purpose, or to secure the future payment of money, or the future transfer of any stock." It was decided in the Travis Case that a transfer from one nominee to a second, and an indorsement of the certificate by the latter, who made delivery of it on behalf of the true owner, involved two taxable transfers, though in neither event was there any change in the beneficial interest. In Bonbright & Co. v. New York, Howard, J., said:

"'The expression 'legal title' is frequently used in stock transactions and in other transactions to describe a naked appearance of title, or a limited title appearing complete on its face. It is so used in the agreement in this case. * * * The expression 'legal title,' as used in the amended statute, must be held to signify the appearance of title, as distinguished from a full and complete title. The statute recognizes that this appearance of title to the stock may be transferred, while the real title, the real ownership, remains in the transferror." 165 App. Div. 640, 644, 645, 151 N. Y. S. 35, 38.

Thus the New York courts sustained a tax upon the theory that there was transfer to the nominee not merely of possession but of the very title to the shares as the term "title" was used in the statute. We only have to go so far as to hold that there was a disposition of the right to receive.

We do not think that the arrangement whereby the certificate was delivered by the seller directly to the plaintiff avoided the imposition of a tax. There was a transfer to Benton & Co. of the right to receive the stock, and even the certificate was unavailable for use until indorsed by Benton & Co. or by the plaintiff as the agent of the latter under the power of attorney contained in the contract between the parties.

The plaintiff further contends that the decision in Union Trust Company v. Heiner, supra, to the effect that such a transfer as the one now in question is not taxable, should bind the government because Congress by subsequently reenacting the Stamp Tax Law adopted the construction of [fol. 48] the statute promulgated by that decision. But the provisions of the act involve no ambiguity, nor was there any continued acquiescence on the part of the government in the ruling in the Heiner Case, nor has there been a decision by any appellate court so construing the act. Moreover, under an amendment to Schedule A (3) of section 800 of Revenue Act of 1926 by section 723 of the Revenue Act of 1932 (26 U. S. C. A. § 900 note), a new proviso was added to the effect that the tax should not be imposed upon deliveries or transfers from a fiduciary to a nominee of such fiduciary or from one nominee of such fiduciary to another. This amendment can hardly be regarded as futile. It is strongly persuasive of a congressional intent to tax transfers to nominees in all cases other than those specifically excepted under the provisos of the section.

In view of the foregoing, we think it clear that the tax levied in the present case was properly imposed.

Judgment affirmed.

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 13th day of July, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

FOUNDERS GENERAL CORPORATION, Plaintiff-Appellant,

vs.

JAMES J. HOEY, Collector, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 50] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Founders General Corporation vs. James J. Hoey, Collector, etc. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 13, 1936. William Parkin, Clerk.

[fol. 51] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 50, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Founders

General Corporation, Plaintiff-Appellant, against James J. Hoey, Collector, etc., Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of August, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 9, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following Nos. 330 and 331.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.